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UNITED STATES OF AMERICA

NATIONAL LABOR RELATIONS BOARD

REGION 21

COASTAL MARINE SERVICES, INC., Respondent, and INTERNATIONAL ASSOCIATION OF HEAT & FROST INSULATORS AND ALLIED WORKERS, LOCAL 5, Charging Party.	Case 21-CA-139031 **MOTION FOR RECONSIDERATION**

Charging Party hereby moves the Board for an Order granting reconsideration.

This motion is focused upon footnote 2. The Board never read the pleadings or the Complaint in this matter. It just issued a kneejerk response because the Board wants to duck the issues which were raised in the Supplemental Brief and the Cross-Exceptions.

We present these arguments to the Board to highlight them for the court of appeals.

The relevant language of the Complaint alleges as follows:

> 4. (a) At all material times, and since at least April 25, 2015, Respondent has maintained as a condition of employment for all of its employees at the San Diego facility an agreement entitled "Employee Acknowledgement and Agreement," a copy of which is attached as Exhibit A, that contains provisions requiring employees to resolve employment-related disputes exclusively through individual arbitration proceedings and to relinquish any rights they have to resolve disputes through collective of class action
>
> (b) At all material times, and since at least on or about April 25, 2014, employees would reasonably conclude that the provisions of the Employee Acknowledgement and Agreement described above in paragraph 4(a) and as fully set forth in Appendix A, preclude employees from engaging in conduct protected by Section 7 of the Act.

This language is broad enough to encompass, not only bringing actions as "collective or class action[s]." There happens to be an "and" because the two clause. The Complaint alleges that the "Employee Acknowledgment and Agreement" "contains provisions requiring employees to resolve their employment-related disputes exclusively through individual arbitration proceedings …." That "and" is conjunctive. It applies to all kinds of claims and precludes them from being brought or pursued except individually through arbitration.

If this wasn't enough, the partial Stipulation of Facts in paragraph 6 stated:

> 6. At all material times, and since at least on or about April 25, 2014, Respondent has maintained as a condition of employment for all of its employees at the San Diego facility an agreement titled "Employee Acknowledgement and Agreement," a copy of which is attached to the Complaint as Exhibit A, and which is also attached as Exhibit 7.
>
> 7. (a) General Counsel takes the position that at all material times since at least on or about April 25, 2014, employees would reasonably conclude that the provisions of the "Employee

> Acknowledgement and Agreement" attached as Exhibit 7 and described above in paragraph 6, preclude employees from engaging in conduct protected by Section 7 of the Act.
>
> (b) Respondent takes the position that at all material times since at least on or about April 25, 2014, employees would not reasonably conclude that the provisions of the "Employee Acknowledgement and Agreement" attached as Exhibit 8 and described above at paragraph 6, preclude employees from engaging in conduct protected by Section 7 of the Act.

This language is surely broad enough to encompass all Section 7 rights, not just those which may be limited by class or collective actions.

The record is there. The Complaint and Partial Stipulation are broad enough to encompass the Charging Party's claims.

The Board has noted that it may find violations even they are not the theory of the General Counsel:

> To begin, we disagree with the Respondent's claim that the judge violated its due process rights by deciding this case on a legal theory that was not advanced by the General Counsel. Before the judge, the General Counsel argued that the Union needed to review the full, unredacted Home Services Provider (HSP) subcontracting agreement between DirecTV and the Respondent in order to determine whether those entities were joint employers for purposes of collective bargaining, or alternately to verify the Respondent's claims about the nature of their relationship. The judge rejected both arguments and found instead that the Union was entitled to see the full HSP to verify the Respondent's claim that it had furnished all portions of that document relative to the scope of bargaining-unit work.
>
> "The Board, with court approval, has repeatedly found violations for different reasons and on different *theories* from those of administrative law judges or the General Counsel, even in the absence of exceptions, where the unlawful conduct was alleged in the complaint." *Local 58, Int'l Brotherhood of Electrical Workers (IBEW), AFL-CIO (Paramount Industries, Inc.),* 365 NLRB No. 30, slip op. at 4 fn. 17 (2017) (emphasis in original) (citing cases); accord, e.g., *Davis Supermarkets, Inc. v. NLRB*, 2 F.3d 1162, 1169, 303 U.S. App. D.C. 193 (D.C. Cir. 1993), *cert. denied* 511 U.S. 1003, 114 S. Ct. 1368, 128 L. Ed. 2d 45 (1994). When analyzing whether a judge's finding of a violation on a theory that was not clearly articulated by the General Counsel violates a respondent's due process rights, the Board considers (1) whether the language of the complaint encompasses the legal theory upon which the violation was found; (2) whether the factual record is complete, or, in other words, whether the facts necessary to find a violation under the theory in question were litigated; (3) whether

> the law is well established; and (4) the General Counsel's representations about the theory of violation, and the differences between the litigated theory and the theory upon which the judge relied in finding the violation.

DirectSat USA, LLC, 366 NLRB No. 40 (2018), Motion for Reconsideration denied, 366 NLRB No. 141 (2018).

These theories are encompassed within the allegations of the Complaint and were litigated from the beginning.

It is also worth noting that at no point did the General Counsel object to the arguments made by the Charging Party. It was the Board itself which raised this issue, not the General Counsel. It's hard to argue that the arguments are outside the scope of the Complaint when the General Counsel has not taken that position.

We note that the Board's error in this regard is magnified by the point that the Federal Arbitration Act is not a statute which the Board administers and its views on the scope of the Federal Arbitration Act are, in fact, irrelevant. It's up to the courts to determine the application of the Federal Arbitration Act or other statutes, including the Religious Freedom Restoration Act. See, *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1629, 200 L. Ed. 2d 889, 908, 2018 U.S. LEXIS 3086, *34, (2018) ("on no account might we agree that Congress implicitly delegated to an agency authority to address the meaning of a second statute it does not administer."). See, *New Prime, Inc. v. Oliveira, 17-340* (2019) (court must determine whether FAA applies).

Nothing in the cases cited by the Board prevent a Charging Party from arguing that a legal affirmative defense asserted by a Respondent is legally incorrect particularly when the defense is based on a statute other than the National Labor Relations Act.

The Board's decision is spurious. In response to the Affirmative Defense of the application of the Federal Arbitration Act, the General Counsel or the Charging Party who has intervened is entitled to point out the legal error of applying a federal statute which the Board does not administer. Neither the General Counsel nor the Board has the right to take the position that another federal statute or constitutional issue cannot be raised.

For these reasons, the Motion for Reconsideration should be granted. Absent that, the Charging Party will take this case to a Circuit Court which we are convinced will reverse the Board. By the time it gets back to the Board, we will enjoy a new Board, appointed by a new President, who will respect the rights of workers.

Dated: February 4, 2019

Respectfully submitted,

WEINBERG, ROGER & ROSENFELD
By: A Professional Corporation

/s/ David A. Rosenfeld
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PROOF OF SERVICE

I am a citizen of the United States and resident of the State of California. I am employed in the County of Alameda, State of California, in the office of a member of the bar of this Court, at whose direction the service was made. I am over the age of eighteen years and not a party to the within action.

On February 4, 2019, I served the following documents in the manner described below:

MOTION FOR RECONSIDERATION

☑ (BY ELECTRONIC SERVICE) By electronically mailing a true and correct copy through Weinberg, Roger & Rosenfeld's electronic mail system from kkempler@unioncounsel.net to the email addresses set forth below.

On the following part(ies) in this action:

Executive Secretary
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VIA E-FILING

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I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on February 4, 2019, at Alameda, California.

/s/ Karen Kempler
Karen Kempler